[K-132]

80-371
No.

Supreme Court, U. S.
FILED
OCT 21 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

PAUL P. RAO,

Petitioner,

against

STATE OF NEW YORK.

BRIEF IN OPPOSITION

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Question Presented

Will certiorari lie from an Order and Judgment of a State Court where the State Court did not pass on a federal question and the State Court determination rests upon adequate State grounds?

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New York State Court of Claims Act,
Judiciary Law, §§ 8 and 10(3)

Section 8. Waiver of immunity

"§ 8. Waiver of immunity from liability

"The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article. Nothing herein contained shall be construed to affect, alter or repeal any provision of the workmen's compensation law.

* * *

"§ 10(3)

"A claim to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the state while acting as such officer or employee, shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim."

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Statement of the Case

Petitioner was indicted in May of 1974 on two counts of perjury, by the Extraordinary Special Grand Jury for Kings County, New York, as a result of testimony he gave in April of 1974 to that same Grand Jury. The indictment charged that the petitioner swore falsely when he denied that he had told someone that the way to handle a particular matter was to "get a lawyer that knows the judge", whereas in truth and in fact, the petitioner did tell a certain individual that the way to handle the matter was to "get a lawyer who knows the judge"; and that petitioner "swore falsely when he testified that he never told a certain individual how to handle her problem in affecting a judge's actions on a criminal case".

The indictment resulted from an investigation of corruption in the criminal justice system in New York City, during which the petitioner's assistance was sought by an undercover agent

concerning a fabricated criminal case, and petitioner's conversation was recorded.

Several challenges were made to the indictment (see *People v Rao*, 53 AD2d 904 [2d Dept, 1976]; *Matter of Nigrone v Murtagh*, 46 AD2d 343 [2d Dept, 1974], affd 36 NY2d 421), and it was ultimately dismissed on March 15, 1977 (*People v Rao*, not reported, Sup Ct, Kings Co, SANDLER, J., March 15, 1977). This claim for malicious prosecution was thereafter filed on May 17, 1977.

Summary of Argument

This is a State tort claim, not a Federal civil rights action. The State courts factually found that there was probable cause for the prosecution and therefore an action for malicious prosecution would not lie. The State courts also held collaterally that the prosecutor, and derivatively the State, enjoyed absolute immunity for his conduct before the Grand Jury, and in prosecuting the indictment. The decisions of the State courts did not expressly pass on any Federal questions and rest on adequate State grounds.

ARGUMENT

Certiorari does not lie from the Order of the State Court where the State Court did not pass on a federal question and where the State Court Decision rests on adequate grounds.

This action for malicious prosecution against the State of New York was commenced May 17, 1977, by filing a claim in the State Court of Claims pursuant to the New York State Court of Claims Act (New York State Judiciary Law, Court Acts, Court of Claims Act). The State of New York, as sovereign, can be sued in tort only insofar as it has waived its sovereign immunity under said Court of Claims Act (cf. *Edelman v Jordan*, 415 US 651; *Petty v Tennessee-Missouri Bridge Comm.*, 359 US 275; *McDonald v State of Illinois*, 557 F2d 596, cert den 434 US 966). The claim sought to hold the State derivitively liable under the doctrine of *respondeat superior* for the activities of former Special Prosecutor Maurice Nadjari and his staff for the criminal prosecution of the petitioner on two counts of perjury.

It should be emphasized that this is a State tort claim, not a Federal civil rights action. Indeed, federally created rights cannot be pursued in the New York State Court of Claims since it is a court of limited jurisdiction (*Maloney v State of New York*, 3 NY2d 356; *Brody v Leamy*, 90 Misc 2d 1). The State, moreover, would not be subject to a Federal civil rights action (Eleventh Amendment, US Constitution; *Monell v Dept. of Social Services*, 436 US 658; *Scheuer v Rhodes*, 416 US 232; *Edelman v Jordan*, 415 US 651; *Ford Motor Co. v Indiana Dept. of the Treasury*, 323 US 459; *Hans v Louisiana*, 134 US 1), and, in any event, *respondeat superior* is not a predicate for liability in a Federal civil rights action (*Monell v Dept. of Social Services, supra; Williams v Vincent*, 508 F2d 541; *Adams v Pate*, 445 F2d 105).

No Federal question was considered by the State courts, which solely analyzed the claim under State Tort Law and granted and

affirmed summary judgment to the State on the ground that there was probable cause for the indictment (Petitioner's Appendix, B-6, B-7). Collaterally, the State courts also held that the Special Prosecutor, and derivatively the State, enjoyed absolute immunity for the conduct of the Grand Jury presentation and the prosecution of the indictment.

To the extent that the petitioner now seeks to assert causes of action for alleged abuses by the Special Prosecutor in his investigatory and administrative roles, such causes of action, assuming they exist, would be jurisdictionally barred by virtue of the time limitations of New York State Court of Claims Act, § 10, which requires a claim or a notice of intention to be filed within ninety days of its accrual. The activities of which petitioner now complains occurred in 1972, 1973 and 1974. The claim was not filed until May 17, and would therefore be untimely.

Furthermore, petitioner sustained no actionable injury under State Tort Law for the alleged abuses prior to his indictment. The sole damages alleged in his claim are those arising out of his indictment. In *Lee v Willins*, 617 F2d 320, the Second Circuit held that the test for distinguishing the absolute immunity accorded to advocatory activities from the qualified immunity applicable to investigatory activities is the type of harm allegedly suffered.

Finally, regardless of what the Special Prosecutor may have done, nothing would excuse lying to the Grand Jury. It is undisputed that Petitioner denied under oath making statements, and that evidence was produced before the Grand Jury that he had, in fact, made those statements which he had denied making.

Accordingly, the State courts did not decide a substantial Federal question and the decision sought to be reviewed rests upon adequate State grounds. Certiorari, therefore, does not lie *(Newsom v Smith*, 365 US 604).

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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